United States Court of Appeals

for the Second Circuit



APPELLANT'S BRIEF

ORIGINAL

74-1878

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P/S

To be argued by

MORRIS WEISSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

UNITED STATES OF AMERICA, :

Appellee, :

-against- :

THEODORE KOSS and KOSS SECURITIES CORPORATION, :

Defendants-Appellants. :

- x

APPELLANTS' BRIEF

- x

MORRIS WEISSBERG
Attorney for Appellants
15 Park Row
New York, N.Y. 10038
212 964 0492

UNITED STATES COURT OF APPEALS
FILED
AUG 8 1974

INDEX TO BRIEF

		PAGE
Preliminary Statement		1
Statement of Issues		1
Statement of the Case		4
Course of Proceedings		5
The Evidence		7
Point I	There was not sufficient evidence that Koss was guilty of the conspiracy charged in the indictment.	13
Point II	Koss was prejudiced by evidence that he participated in a different conspiracy from the one charged in the indictment. Such evidence entitled Koss to dismissal of the indictment against him, or to a severance, or, at least, to a cautionary charge to the jury differentiating the evidence against Koss from the evidence against the other defendants.	28
Point III	The evidence was insufficient for conviction of Koss on the substantive counts of stock fraud, and mail fraud, counts 2, 3, 5, 8 and 11.	32
Point IV	There was insufficient evidence to convict Koss of count 4 of the indictment, which charged him with non compliance with the requirement to deposit in escrow money he received from subscribers in the all or nothing public offering of the shares.	35
Point V	The evidence was insufficient to convict Koss of count 13 of the indictment, which charged him with submission of false documents to the S.E.C.	38
Point VI	Without submitting the issue of entrapment to the jury, the indictment should have been dismissed for entrapment, as a matter of law, because of evidence that at the time when they formulated and carried out the conspiracy, Hellerman and Taylor were Government informants, while they, themselves were committing the crimes charged in the indictment.	39a

INDEX TO BRIEF (Continued)

		PAGE
Point VII	Koss was surprised and prejudiced by insufficient pre-trial disclosure by the Government of documents and transactions not disclosed in the indictment, or in the bills of particulars.	41
Point VIII	Koss was prejudiced by the erroneous exclusion from evidence of his checks, customers' account cards, and customers' signature cards, which Koss gave to the Government pursuant to subpoena duces tecum.	42
Point IX	The order appointing counsel for Koss, as an indigent defendant, should not have been vacated, effective retroactively, leaving counsel without compensation for his work.	43
Conclusion		44

CASES CITED

	PAGES
Ingram v. United States, 360 U.S. 672 (1959)	23; 35
Kotteakos v. United States, 328 U.S. 750 (1945)	27; 29
Sherman v. United States, 356 U.S. 369 (1967)	40
Sorrells v. United States, 287 U.S. 435 (1932)	40
Stevens v. United States, 206 F. 2d 64 (C.A. Tenn. 1953)	39a
United States v. Archer, F.2d (C.A.2, 1973)	41
United States v. Calamaro, 354 U.S. 351 (1957)	23; 27; 35
United States v. Falcone, 109 F. 2d 579 (C.A.2, 1940), aff'd. 311 U.S. 205 (1940)	23; 26
United States v. Kelly, 349 F. 2d 720 (C.A.2, 1965)	30
United States v. Lewis, 406 F. 2d 486 (C.A.Illinois, 1969)	39a
United States v. Russell, 411 U.S. 423 (1973)	40
United States v. Weiler, 385 F. 2d 63 (C.A.3, 1967)	39a

STATUTE CITED

18 U.S.C. §3006A	44

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UNITED STATES OF AMERICA, :
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Defendants-Appellants. :

- x

Docket #74-1878

APPELLANTS' BRIEF

Preliminary Statement

Defendants appeal from a judgment convicting them of conspiracy to violate the securities laws, and the mail fraud laws, and of seven substantive offenses, after trial before Hon. Charles E. Metzner, District Judge, and a jury. No opinion was written by the Court below in making such judgment, and in denying defendants' motion for a new trial.

Statement of Issues

1. Was there sufficient evidence that Koss was guilty of the conspiracy charged in the indictment?

2. Did the evidence show that Koss participated in a different conspiracy from the one charged in the indictment; and was Koss prejudiced by such evidence?

3. Was the evidence sufficient to convict Koss on the substantive counts of stock fraud, and mail fraud, counts 2, 3, 5, 8 and 11?

4. Was the evidence sufficient to convict Koss of count 4 of the indictment, which charged him with non compliance with the requirement to deposit in escrow money he received from subscribers in an all or nothing public offering of securities?

5. Was the evidence sufficient to convict Koss of count 13 of the indictment, which charged him with submission of false documents to the S.E.C.?

6. Should the indictment have been dismissed for entrapment, as a matter of law, without submitting the issue of entrapment to the jury, because of evidence that at the time when they formulated and carried out the conspiracy, Hellerman and Taylor were Government informants while they, themselves, were committing the crimes charged in the indictment?

7. Was there insufficient pre-trial disclosure by the Government of documents and transactions in the indictment, and in the bill of particulars; and was Koss surprised and prejudiced by such insufficient disclosure?

8. Were the checks, customers' account cards, and customers' signature cards, which Koss gave to the Government pursuant to subpoena duces tecum, erroneously excluded from evidence; and was Koss prejudiced by the exclusion of such documents from evidence?

9. Was the order appointing counsel for Koss, as an indigent defendant, properly vacated, effective retroactively, thereby leaving counsel without compensation for his work?

STATEMENT OF THE CASE

On June 14, 1974, Theodore Koss, and Koss Securities Corporation, among others, were convicted of conspiracy to violate the securities laws, and conspiracy to commit mail fraud (Count 1); fraud in the offer and sale of securities (Count 2); fraud in the purchase and sale of securities (Count 3); failure to deposit in escrow money received from purchasers of securities in an all or nothing public offering thereof (Count 4); mail fraud (Counts 5; 8; 11); and giving false writings to the Securities and Exchange Commission (Count 13); (A4-14).

The Koss defendants have appealed to this Court from such judgment of conviction on the grounds that the evidence did not show that they joined or participated in the conspiracy, or that they had a stake therein; and that the documentary evidence conclusively disproved the oral testimony of Michael Helleman, the leader of the conspiracy, who was also a Government informant, that the Koss defendants participated in the conspiracy. Such documentary evidence showed, among other things, that the Koss defendants did not have physical possession of stock certificates for 5,000 shares, which Mr. Helleman testified his associate, the co-defendant, Erwin Layne, took away from Koss' office, in furtherance of the conspiracy.

The Koss defendants also appeal from the judgment herein on all the other grounds briefed herein under the "Statement of Issues", and under the Points herein.

Course of Proceedings

The indictment was filed on September 25, 1973. On October 9, 1973, the Koss defendants pleaded not guilty to the indictment.

On October 18, 1973, the Koss defendants made a motion for a bill of particulars, for discovery, and to dismiss the indictment. Such motions were denied by an order dated February 25, 1974, except that the Government was directed to furnish certain particulars which it consented to furnish.

Motions by several defendants, including Koss, for severance, were denied, except that Koss' and other defendants' motions for severance of counts 12 and 13 and for separate trial thereof were granted by an order dated March 12, 1974, but an order dated March 29, 1974, reconsidered the prior order, and denied severance of count 13 and directed trial thereof together with counts 1 to 11 of the indictment.

On March 28, 1974, on Koss' application, as an indigent defendant, the Court appointed Morris Weissberg as his counsel, under the Criminal Justice Act.

The case was tried before the Court (METZNER, J.), and a jury, between April 17, 1974, and May 10, 1974, with no trial between April 29, 1974 and May 6, 1974, due to illness of Robert Mitchell, counsel for the co-defendant, Erwin Layne.

On May 10, 1974, the jury found Theodore Koss guilty of the aforesaid 8 counts; and it found Koss Securities Corporation guilty of the same counts, except count 13, which charged

submission of false documents to the S.E.C.

On June 7, 1974, the Koss defendants made a motion for a new trial under Rule 33, F.R.C.P., and they submitted a memorandum of law in support of such motion, which was denied.

On June 14, 1974, judgment of conviction was made. Theodore Koss was sentenced to imprisonment for 1 year on count 1, with sentence suspended on the remaining counts; and he was placed on probation for 3 years. Koss Securities Corporation was sentenced to pay a fine of $1,500 on count 1, with sentence suspended on the remaining counts. Bail was continued, pending appeal.

On June 24, 1974, the Koss defendants filed a notice of appeal from such judgment of conviction.

On June 21, 1974, the Court vacated its prior order of March 28, 1974, appointing Morris Weissberg, as counsel for Theodore Koss, because of differences between statements as to Koss' financial condition in the probation report, and in Koss' affidavit in support of his application for appointment of counsel.

The Evidence

MICHAEL HELLERMAN, named a co-conspirator in the indictment, testified that in late December, 1970, he met with co-conspirators Murray Taylor and Murray Levine, about an underwriting by Koss of 65,000 shares of Automated Information Systems, Inc (A19). Mr. Levine was then a registered representative employed by Koss, who resigned such employment in January, 1971. (T900).

Mr. Hellerman said to Messrs. Levine and Taylor that he would buy the whole 65,000 share public offering of Automated Information Systems, Inc., at the $1 per share public offering price (A19).

Mr. Levine said that Mr. Koss had already sold approximately 15,000 shares, he didn't know the specific amount, and he would have to speak to Mr. Koss to finalize the deal (A19).

Mr. Hellerman said the only way he would do the underwriting was if he could control the whole "box" of 65,000 shares of stock (A19); that he wanted one-half of the proceeds of the underwriting, namely, $32,500 "as my fee for underwriting the stock" (A20); and that:

> "I wanted to know if Mr. Koss would give up his stock that he sold and, if he didn't give up the stock that he sold, that I wouldn't do the deal." (A20).

Shortly after February 13, 1971, Mr. Hellerman again met with Messrs. Levine and Taylor about the public offering of 65,000 shares of Automated Information Systems, Inc. ("Automated") (A21). Hellerman said that Levine said that:

> "Koss didn't want to go along with giving up his 15,000 shares of stock, but he came to me this time because they weren't able to sell any more stock ### ." (A21).

Mr. Hellerman said that Mr. Levine showed an amended offering circular which added the name of Interstate Equities Corporation ("Interstate"), as a co-underwriter with Koss of such 65,000 shares of Automated (A23). Interstate was a newly formed over-the-counter brokerage firm, owned and operated by Stephen Zardus, a co-defendant herein (T529-530). Mr. Hellerman said (A23):

> "Mr. Levine told me that the reason he substituted Interstate Equities was because with Mr. Zardus he was sure that any deal we worked out would be kept and as far as Mr. Koss was concerned, he couldn't sell any more stock, he had sold 15,000 shares of stock. Mr. Koss agreed with Mr. Levine that he would do whatever Mr. Levine asked him to do to benefit the deal. He would hold the stock and he wouldn't sell the stock into the market or back-door the stock or anything like that."

Mr. Hellerman testified that he also said at this meeting shortly after February 13, 1971 (A24-25):

> " ### before we left the meeting I turned to Mr. Taylor and I said, 'Murray', that was his name, too, Murray Taylor, I said, 'Do you understand that Mr. Levine has just told me that the 15,000 shares of stock that Teddy Koss has possession of, that he will not sell into the market and he has made an agreement to sell me back 15,000 shares at $1,50 within a 60 or 90-day period so I will have complete control of the 65,000 shares of stock; that I am going to sell 50,000 less whatever small amount Interstate Equities is going to sell,' which was about 4000 shares, 4500 shares, 'and I will have control of Mr. Koss' stock by giving him a 50 per cent profit or paying him $1.50 for the $1 stock that was coming out in the offering within a short period of time so I will have control of the whole 65,000 shares of stock.'
>
> Mr. Levine agreed that he would guarantee that, and I told Mr. Levine that he was going to get a percentage of the profit that Mr. Taylor and Mr. Layne and myself were going to make on the deal, and I said, 'Murray', me talking to Murray Levine now, I said, 'Murray, I realize you don't have the money to make good if I take the stock from $1 to $5 and Mr. Koss sells 10 or 15 thousand shares into the market, I realize you don't have $75,000 to make good your guarantee of the 15,000 shares, so I am going to take off your percentage of the deal the profit you are supposed to make any stock that

"'Mr. Koss sells into the market,' and Mr. Levine agreed to that. When Mr. Levine agreed to that, we started to sell the stock."

Stephan Zardus sold 4,400 shares to 6 of his customers (T534; A27), leaving 45,600 shares for the Hellerman conspirators to buy and re-sell (A27; T536). The Hellerman conspirators sold about 17,000 shares in legitimate sales to actual persons, leaving about 28,000 shares for them to sell. Mr. Hellerman testified (A28):

"So I told Mr. Taylor to go to a telephone book and just take the names out and the addresses out and that is the list that I gave to Mr. Zardus to sell that 28,000 shares to."

Between February 15-18, 1971, Mr. Hellerman, with Messrs. Taylor and Levine, met with Robert Santis, president of Automated (A29). Mr. Santis said that one half of the proceeds was too much money for selling the stock (A29). Mr. Hellerman testified that he said (A30):

" *** I said I was concerned, very much concerned, with Teddy Koss having 15,000 shares; that if Teddy Koss didn't live up to his agreement and sell me the 15,000 shares at $1.50 that I wouldn't have the box in the stock and I wouldn't be able to sell them or wouldn't be able to raise additional funds at a later date.

Mr. Santis said I shouldn't worry about Mr. Koss; that although I had never met Mr. Koss at this point, he had given his word to Murray Levine, the stock broker, and Mr. Santis said he would make sure that Mr. Koss lived up to his word of selling me the $15,000 shares at $1.50.

Mr. Hellerman said that his partners in the conspiracy were (A31):

"When I had our conversations I was going to give Murray Taylor, after paying off Murray Levine, the stock broker, for the work he was going to do, and after paying off Stephen Zardus for the work he was going to do and paying off the traders and the stock, Mr. Layne was going to get 25 per cent of the deal, and Mr. Taylor was going to

"get 25 per cent of the deal, and I was going to get 50 per cent of the deal."

Murray Levine testified on cross-examination (T927):

"Q Did you have an agreement with Hellerman and Taylor to share in their profits of what they were doing in the sale of shares of Automated? A Yes

Q What share were you to receive? A 10 per cent of the profits."

Mr. Hellerman described his activities in selling to the public the shares of Automated which he caused Interstate to issue in names of stockholders taken from telephone books, as follows (A25-26):

"Well, because of my first agreement with the government, I introduced customers that were going to buy the stock to Murray Taylor and I tried to blame the deal -- I tried to make believe it was Murray Taylor's deal, not mine, so if anything happened with the deal, I wouldn't get blamed for it. *** Mr. Murray Levine from the union came to see Mr. Taylor, I had been sitting in a room and I would say, 'If you buy a thousand shares of stock at a dollar, we will guarantee your thousand dollars, that you can't lose your thousand dollars, but we want 50 per cent of the profits of the stock when it is sold at 5 or 8 or 10' and with many of the legitimate people that were put into the offering, that is the kind of deal we made with them."

In addition to selling shares themselves, Messrs. Hellerman and Taylor also obtained the following stock salesmen, whom they paid a commission on each share they sold, to sell shares of Automated for them: Herbert Shulman(T207); Steve Adlman (T208); and Robert Kolbert(T209). Kolbert allegedly recruited co-defendants William McGee (T721), and Steve Hagler (T729). Mr. Hagler was acquitted. Mr. McGee was convicted.

Mr. Hellerman also testified that he met Mr. Koss for the first time in Miami about April 10, 1971, where they talked:

"So I said, 'What do you want to do?'

He said, ' ### I want 5000 shares of the stock for myself personally.'

So I said, 'You mean you want to take it from your customers, at whatever you take it from them is your business. You want to keep the 5000 shares?' He said, 'Yes'.

I said, 'When are you going to get out of the stock? Are you going to back-door me when the stock is the highest?' He said, 'No.' ### He says, 'No, he'll sell the stock when I sell -- as I sell out my position, he'll sell out proportionately, and he will listen to everything I tell him to do and he won't do any back-dooring and to let him have 5000 shares of the stock because he wants to make some money. ### I said, 'All right, Are you going to sell me the balance of the stock as per the agreement with Murray Levine and sell me the balance?' He says, 'Yes.' We figured out there was a balance of 8800 shares after the 1200 and he said, yes, he would sell me that stock at $1.50." (A49-51).

After he returned from Miami on Sunday, April 18, 1971, Mr. Hellerman talked to Mr. Koss as follows (A53-54):

"Well I had taken Mr. Koss out of approximately 5000 shares of stock within that 10-day period that I was in Florida and he started to get greedy and he started to tell me that he was going to bang the market, meaning to take the balance of the stock that he had, the 8800 shares, and throw it on the market and ruin the market if I didn't take him out of the stock faster.

\# \# \#

I told him to open up an account for Robert Angona and an account for Donald Saxon and I told him to take 3000, 2000 for Angona and a thousand for Saxon, and take it out of his trading account or from his customers, in other words, buy the stock at a price from his customer and then take that and make the profit, whatever he wants in between, the one point or two points or three points for himself or for his trading account. ###

I told him Mr. Saxon and Mr. Angona would pay for the stock because when you sell a stock you have seven days to pay for it. When you buy a stock you have seven days to pay for it and when you sell it you wait seven days for your check, so he gave me a week until I would have to pay Mr. Koss for the stock, but he would be off my back for that week and I wouldn't have to keep worrying about taking him out of more stock."

Four, five, six days after his return from Florida on Sunday, April 18, 1971 (A57), Mr. Hellerman talked to Mr. Koss as follows (A59-61):

" ### this is Mr. Koss now talking to me -- he said, 'You're not taking me out of the stock fast enough and I'm not going to sell you the stock at $1.50 any more. Now I want $2.50 for the stock and if you don't give me $2.50 for the stock, I'm going to sell all the stock on the market again.'

\# \# \#

I said, 'Are you going to trust Erwin Layne with the stock?' I said, 'After all, Erwin is your buddy.' He said 'All right, I'll trust Erwin with the stock.

\# \# \#

Q Now, did there come a time when Mr. Layne went down at your request to Mr. Koss? A Yes, sir.

\# \# \#

Q What did he return with? A 5000 shares of Automated Information Systems.

Q Did you pay Mr. Koss for that 5000 shares?
A Yes, I did, sir.

Q How much did you pay him? A $7500.

Q Where did you pay him? A The Carriage House. Not one time, I did not give him $7500 at one time. I gave him 2000, I gave him 1500, I gave him 1000, I gave him the original deal that I had made with him, I gave him a dollar and a half a share for the 5000 shares of stock."

Additional relevant facts will be stated in the argument of the Points herein.

POINT I

THERE WAS NOT SUFFICIENT EVIDENCE THAT KOSS WAS GUILTY OF THE CONSPIRACY CHARGED IN THE INDICTMENT.

I.

The Government's main claim that Koss participated in Hellerman's conspiracy to raise the market price of shares of Automated, and to sell at such inflated market prices the shares which Hellerman caused Interstate to issue to names taken from telephone books, is based on Hellerman's testimony that in Miami, Florida, around April 10, 1971, Koss agreed with Hellerman to sell to Hellerman 8,800 shares of Automated at $1.50 per share (A49-51); and that around April 23, 1971, in New York City, Koss further agreed with Hellerman that one of Hellerman's partners in the conspiracy, the co-defendant Erwin Layne, shall go to Koss' office and physically take away therefrom and bring back to Hellerman stock certificates for 5,000 shares of Automated, which Layne did, according to Hellerman (A59-61); and Hellerman paid Koss $1.50 per share therefor, in instalments totaling $7,500, beginning around April 22, 1971 (A61; A73).

Hellerman's oral testimony, summarized above, is contrary to indisputable documentary evidence in the record that Koss did not have in his possession stock certificates for 5,000 shares of Automated around April 23, 1971, or before, for Layne to take away and bring back to Hellerman.

On March 15, 1971, Automated's transfer agent, Fidelity

Registrar and Transfer Company ("Fidelity"), issued and mailed to Koss' customers stock certificates for the 15,000 shares of Automated which Koss sold them as his participation in the offering of 65,000 shares of Automated. All stock certificates issued to Koss' customers were dated March 15, 1971.

Koss' confirmations, in evidence, show that between March 16, 1971, and April 23, 1971, Koss traded in shares of Automated, as follows:

SALES BY KOSS' CUSTOMERS TO BUYERS OTHER THAN KOSS, OR INTERSTATE EQUITIES CORP.: KOSS ACTING AS SELLER'S BROKER:

TRADE DATE	SELLING CUSTOMER	NUMBER SHARES	PRICE	BUYER	GOVT EXH.#
3.16.71	ANTELIS	200	1.00	SCHWEICKART & CO	2(a)
3.16.71	HOFFNUNG	300	1.00	SCHWEICKART & CO	2(b)
3.18.71	ROAST, F.	500	1.00	COHN SIMONSON	2(c)
3.23.71	MARK, P.	500	1-3/8	COHN SIMONSON	2(e)
4.16.71	KARKOWSKI	400	3.50	FAHNESTOCK	2(z)
		1,900			

SALES BY KOSS' CUSTOMERS TO INTERSTATE EQUITIES CORP.: KOSS ACTING AS SELLER'S BROKER:

4.7.71	EMKAY, INC.	500	1-5/16	INTERSTATE	2(h)
4.7.71	BERGER	300	1-5/16	INTERSTATE	2(j)
4.7.71	ROST, B.	200	1-5/16	INTERSTATE	2(i)
4.12.71	REISCH, L.	500	1.50	INTERSTATE	2(r)
4.12.71	MURPHY	1000	1.50	INTERSTATE	2(q)
4.12.71	STOLLER	500	1.50	INTERSTATE	2(s)
4.13.71	MACHER	800	1-3/8	INTERSTATE	2(u)
4.14.71	SOBEL	200	1.50	INTERSTATE	2(x)
		4,000			

SALE TO INTERSTATE, BY KOSS, AS PRINCIPAL:

4.7.71	KOSS	1,000	1-5/16	INTERSTATE	2(k)

CUSTOMERS' SALES TO KOSS:
KOSS ACTING AS SELLER'S BROKER, AND AS BUYING PRINCIPAL:

3.23.71	FRIEDMAN	300	1.25	KOSS	2(d)
3.24.71	MACHER	200	1.25	KOSS	2(f)
4.8.71	BRAUNSTEIN	300	1.25	KOSS	2(m)

4.8.71	GARSSON	300	1.50	KOSS	2(l)
4.8.71	HOWARD	300	1.50	KOSS	2(n)
4.13.71	GEARHART	1000	1.50	KOSS	2(t)
4.14.71	POSTOKER	100	1.50	KOSS	2(y)
4.14.71	DARCY	100	1.50	KOSS	2(v)
4.14.71	DASKALAKIS	200	1.50	KOSS	2(w)
4.16.71	PATEL	500	1.50	KOSS	2(bb)
3.29.71	GOLS	500	1.25	KOSS	35; 75
4.20.71	JACOBS	200	1.75	KOSS	60; 71(1)

In addition to the above, on April 19, 1971, Saxon bought 1,000 shares from Dugan for $4.00 per share (Govt. exh. 2cc), and Angona bought 1,500 shares from Koss for 1-9/16 per share (Govt. exh. 71n).

Giving effect to the above transactions, Koss bought 4,000 shares, and sold 2,500 shares, leaving him with 1,500 shares.

Consequently, around April 23, 1971, Layne could not have taken from Koss stock certificates for 5,000 shares and brought them back to Hellerman, because Koss then only had stock certificates for 1,500 shares.

This shows that Hellerman's oral testimony that Layne brought back to Hellerman from Koss stock certificates for 5,000 shares, and that Hellerman paid Koss $7,500 therefor, is not true.

Therefore, the Court below should have granted, instead of denying Koss' motion for acquittal, when he argued that he did not have 5,000 shares for Layne to take from him and to bring back to Hellerman (A114; T1604); and the Court should not have allowed the prosecutor to argue in his summation that

Koss did have stock certificates for 5,000 shares around April 23, 1971, and that Layne took such stock certificates from Koss and gave them to Hellerman.

II.

Upon direct examination, Hellerman gave the following testimony about Angona and Saxon (A53-54):

> "I told him (Koss) to open up an account for Robert Angona and an account for Donald Saxon and I told him to take 3000, 2000 for Angona and a thousand for Saxon, and take it out of his trading account or from his customers ***
>
> *** I told him Mr. Saxon and Mr. Angona would pay for the stock *** ."

While Hellerman later contradicted himself by testifying "To my knowledge it was not paid for" (A224), the purchases of 1,500 shares of Automated by Angona, and 1,000 shares by Saxon, for the aggregate price of $5,923.75, were eventually paid for to Koss, although, at first, Saxon's check to Koss for $780 in partial payment of Saxon's purchase of 1,000 shares from Dugan, was not paid by the Bahamas branch of the Canadian Imperial Bank on which it was drawn, because of insufficient funds (Koss exhibit F; T1284). Saxon testified that Murray Taylor tricked him into signing this check in blank, and giving it to Murray Taylor (T1283-T1287).

Later, the purchases of 1,500 shares by Angona, and 1,000 shares by Saxon, were paid for in full to Koss by Jackie Mason's check for $5,923.75 (Govt. Exh. 68), which Jackie Mason testified he signed in blank and delivered to Murray Taylor (T1348).

Upon cross-examination, Hellerman further contradicted his above-quoted direct testimony, as follows (A83):

"Q Whatever happened to *** the 2000 shares you told Koss to put in Angona's name and the 1000 shares you told Koss to put in Saxon's name, if you know?
A My understandings with Mr. Koss -- I told him to put that 2000 shares in Angona's name and a thousand shares in Saxon's name to stall for time to get an extra week to pay him when he wanted to get out of the stock after I got Mr. Koss out of the first 5000 shares of stock.

THE COURT: You are repeating a lot of information that you are not being asked. You are being asked what happened to the 3000 shares.

THE WITNESS: As far as I was concerned, that was delivered to me. That was part of the package of the 5000 that Mr. Layne brought me. As far as I was concerned, what Mr. Koss did with it or how he handled it on his books or anything else, I don't know."

Mr. Sorkin, the prosecutor, seized on Hellerman's above-quoted words (A83):

"That was part of the package of the 5000 that Mr. Layne brought me",

and used them as an argument that Angonas' purchase of 1,500 shares from Koss, and Saxon's purchase of 1,000 shares from Dugan, made it possible for Koss, around April 23, 1971, to have physical possession of stock certificates for 5,000 shares of Automated, so that it was possible for Layne to take them from Koss, and Layne did take them from Koss and bring them back to Hellerman.

In opposition to Koss' motion for acquittal, Mr. Sorkin argued (A118):

"THE COURT: In other words, where did Koss have 5,000 to give to Layne?

MR. SORKIN: Well, we know this much, your Honor: We know that at least 2,500 of it comes from Angona and Saxon, because Mr. Angona buys 1,500 from Mr. Koss' house account. We don't know how Mr. Koss got 1,500 into his house account, but we would be supposing or speculating that Mr. Koss bought back 1,500 from some of his other customers."

Koss' confirmations, in evidence, which are summarized in the tabulations at pages 14-15 herein, show that Koss had 3,000 shares on April 19, 1971, so that on April 19, 1971, he could have sold 1,500 shares to Angona, without (A118):

> " *** supposing or speculating that Mr. Koss bought back 1,500 from some of his other customers.

It is obviously illogical to say that Angona's purchase of 1,500 shares from Koss, increased the number of shares Koss had available for Layne to take away from Koss, and to bring back to Hellerman.

The prosecutor apparently recognized this by arguing:

> " *** we would be supposing or speculating that Mr. Koss bought back 1,500 from some of his other customers" (A118).

We showed supra, pp. 14-15, that there was no need of "supposing or speculating", because Koss had 3,000 shares in his trading account on April 19, 1971, when Angona bought 1,500 shares from Koss, so that Koss was able to and he did then sell 1,500 shares to Angona, leaving Koss with only 1,500 shares, so that Layne could only have taken 1,500 shares, and not 5,000 shares from Koss around April 23, 1971, and given them to Hellerman.

The prosecutor, argued, in effect, that in addition to the 3,000 shares which Koss had on April 19, 1971, Koss obtained 1,500 additional shares in some unexplained way.

But there was no evidence to support this "supposing or speculating", so that it could not provide an evidentiary basis for such a finding.

In his summation, the prosecutor argued that around April 23, 1971, Koss had 5,250 shares left from his purchases, as follows (A130-131):

> " *** you add up here the number of sales to his house account -- Friedman, 300 shares; Macher, 200 shares; Gols, 500; Schweickart, 500; Garson, Brownstein, Howard, all of that -- you add that up and you are going to find that when you add up the buyers Mr. Koss comes out with approximately 5250 shares on April 23rd."

By telling the jury (A130-131):

> " *** you add that up and you are going to find that *** Mr. Koss comes out with approximately 5250 shares on April 23rd",

Mr. Sorkin mis-informed the jury about the result it would reach if it did "add that up". Mr. Sorkin did not himself "add that up", by completing the list he began to make to the jury about Koss' purchases and sales of shares of Automated. The tabulations on pages 14-15 herein show that Koss bought only 4,000 shares, and not 5,250 shares.

Mr. Sorkin further told the jury in his summation (A131):

> "Well, how does he possibly have 5000? It's very simple. He does the flip. Saxon, Angona. He buys 1000 shares from Dugan and puts them in Saxon's account, but Saxon doesn't have an account there, it is Mr. Koss' account. He just used the name.
>
> And Mr. Angona, we don't know where this 1500 came

"from, but we know it is in Angona's account. He says he bought it from the house, but this is the house, and Angona didn't have an account there. These are two names Hellerman told him to use."

Saxon's purchase of 1,000 shares from Dugan could not possibly have made such 1,000 shares available to Koss, for Layne to take away from Koss, and to bring back to Hellerman.

On July 22, 1971, Koss mailed to Mr. Levitt at the S.E.C. his firm's check to Dugan for $3,852.50, representing the proceeds of Dugan's sale of 1,000 shares of Automated to Saxon for $4.00 per share (Koss exhibit 1, for identification).

Obviously, Koss would not pay Dugan $4.00 per share for 1,000 shares, and then re-sell them to Hellerman for $1.50 per share. This shows that there is no merit to the Government's argument that Saxon's purchase of 1,000 shares from Dugan was a fictitious transaction, to cover Koss' acquisition of 1,000 shares from Dugan, which he re-sold to Hellerman.

Hellerman's oral testimony that Angona's purchase of 1,500 shares from Koss, and Saxon's purchase of 1,000 shares from Dugan (A83):

" *** was part of the package of 5000 that Mr. Layne brought me",

is disproved by the documentary evidence that such purchases of such 2,500 shares were separately paid for in full by Jackie Mason's check for $5,923.75 (Govt. exh. 68), whereas Hellerman testified that he paid Koss $1.50 per share, totaling $7,500, for the 5,000 shares which Layne took away from Koss and brought back to Hellerman (A61); and that Hellerman made such payments in instalments, beginning around April 22,

1971 (A73).

Therefore, Angona's purchase of 1,500 shares from Koss' trading account, and Saxon's purchase of 1,000 shares from Dugan, did not increase the number of shares Koss had available around April 23, 1971; and Layne could not then possibly have taken away from Koss and brought back to Hellerman stock certificates for such 2,500 shares.

III.

The Government also claimed that Koss' sales aggregating another 5,000 shares of Automated to Interstate Equities Corp., corroborated Hellerman's oral testimony that in Miami, around April 10, 1971, Koss agreed with Hellerman to sell such 5,000 shares to Hellerman for $1.50 per share, in order to give Hellerman control of the whole "box" of 65,000 shares (A49-51).

But such oral testimony by Hellerman is disproved by the documentary evidence that Koss sold 2,000 shares of Automated to Interstate on April 7, 1971, which was three days before Hellerman's alleged agreement with Koss in Miami on or around April 10, 1971 (Govt. exh. 2(h); 2(i); 2(j); 2(k).

Moreover, such 2,000 shares were sold at 1-5/16 (about $1.30) per share, and not $1.50 per share; and another 800 shares were sold to Interstate on April 13, 1971 for 1-3/8 ($1.375), and not $1.50 per share (Govt. exh. 2(u).

Hellerman testified that he wanted to control the whole "box" of 65,000 shares of Automated, so that he could raise

the price of Automated shares (A24-25; A30). To control all the shares, Interstate, which Hellerman controlled, tried to buy shares of Automated in the over-the-counter market from Koss, and from any other person who had such shares for sale.

Significantly, Koss, as agent for his original customers, sold to two other brokerage firms 1,500 shares of Automated between March 16, 1971 and March 23, 1971 (Govt. exh. 2(a); 2(b); 2(c); 2(e); and Koss sold another 400 shares to a different broker on April 16, 1971 (Govt. exh. 2(z).

In these circumstances, Koss' sale of 5,000 shares of Automated to Interstate Equities is not evidence that Koss made such sales pursuant to an agreement with Hellerman to sell such shares to Interstate Equities, and that by such sales Koss aided or participated in the Hellerman conspiracy which is alleged in the indictment.

IV.

The Government also argued that by Koss' guarantees of signatures on endorsements of stock certificates which Hellerman caused to be issued in names taken from telephone books, Koss aided and participated in the conspiracy charged in the indictment.

But the indictment did not charge Koss with agreeing to guarantee such signatures, or with actually guaranteeing them; and Koss' guarantees of such signatures are not evidence of the conspiracy charged in the indictment, which alleged that Koss conspired to violate the securities laws, and the mail

fraud laws by committing frauds in the sale of shares of Automated.

There was no evidence that before or after Koss guaranteed such signatures, Koss knew that the names of such stockholders were taken from telephone books by Hellerman and Taylor, or that Hellerman or Taylor told this to Koss (A63).

Without evidence that Koss knew that the signatures he was guaranteeing were forged, Koss' guarantee of such signatures on such stock certificates did not make him a participant in the conspiracy charged in the indictment to sell Automated shares by means of false statements to buyers thereof, just as sales of sugar and yeast to illicit distillers of whisky did not make such sellers participants in such distillers' conspiracy to distil and ti sell such whisky, United States v. Falcone, 109 F. 2d 579 (C.A.2, 1940), affd. 311 U.S. 205 (1940); and just as "runners" for numbers operators are not participants in such operators' conspiracy to operate illegal numbers games, United States v. Calamaro, 354 U.S.351(1956). See, also: Ingram v. United States, 360 U.S. 672, 678-680 (1959).

V.

The Government also argued that Hellerman's cashing in the same Chase Manhattan Bank branch in which Koss had an account of a check for $2,959.02 (Govt. exh. 5T) payable to order of "Floyd Cooper", and the writing "Koss Securities Corp." on the back of that check, constituted participation by Koss in the

conspiracy charged in the indictment, because that check was given in payment for stock purchased from "Floyd Cooper", a stockholder whose name Taylor took from a telephone book, and Hellerman testified that he forged the endorsement "Floyd Cooper" on that check (T199).

But there was no evidence that Koss asked the bank to cash that check for Hellerman, or that it was Koss who wrote the words "Koss Securities Corp." on the back of that check; and there was no evidence that Koss knew that Taylor took the name "Floyd Cooper" from a telephone book, or that Hellerman forged the endorsement "Floyd Cooper" on that check.

Without such evidence, Hellerman's cashing of that check in the same bank in which Koss had an account, was not evidence of Koss' participation in the conspiracy charged in the indictment.

Moreover, for the reasons discussed in pages 22-23 herein, Koss' alleged assistance to Hellerman to cash that check in Koss' bank, even if proved, was not evidence of Koss' participation in the conspiracy charged in the indictment.

VI.

The Government also charged that Koss' acceptance from Taylor of Jackie Mason's check for $5,923.75, and Koss' application of that check to pay for Angona's purchase of 1,500 shares from Koss, and Saxon's purchase of 1,000 shares from Dugan, constituted participation by Koss in the conspiracy charged in the indictment.

Saxon testified that at Taylor's request he signed in blank a check drawn on his account in the Canadian Imperial Bank in the Bahamas, in wnich he hadonly $100 on deposit, so payment of that check for $780 was not made for "insufficient funds" (Koss exhibit F; T 1281). Saxon testified that he signed that check in blank and gave it to Taylor in reliance on Taylor's representation that in some unexplained way Saxon would thereby get back $5,400 he previously lost through Taylor (T1287). Saxon testified: "I had no idea that this check was going to be used for this purpose" (T1287).

Jackie Mason testified that he signed his name on a blank check for $5,923.75 and gave it to Taylor to buy 1,100 shares of Automated (T1341; Govt. exh. 68). Later, Mason asked Koss for the shares of Automated Mason bought. Koss replied that Mason never bought any such shares through Koss; and that Mason's check for $5,923.75 was applied in payment of purchases of shares of Automated by Angona and Saxon (T1345-1348).

There was no evidence that Koss knew of the circumstances in which Taylor obtained the aforesaid blank checks from Saxon and Mason; or that Koss knew that Taylor obtained from Mason his blank check for $5,923.75 by telling Mason he would use that blank check to buy 1,100 shares of stock for Mason, from Koss.

Therefore, Koss' acceptance from Taylor of Mason's check for $5,923.75 to Koss' order, and Koss' application of that check to pay for purchases of 1,500 shares by Angona, and 1,000 shares by Saxon, did not constitute participation by Koss in the conspiracy charged in the indictment.

VII.

The evidence of Koss' aforesaid actions did not establish that by such actions Koss participated in the conspiracy charged in the indictment.

Hellerman testified that he formulated the conspiracy charged in the indictment, and that he took charge of carrying it out (A23-26); and that as the leader of the conspiracy, he was going to take 50% of its profits for himself, give 25% thereof to the co-defendant, Erwin Layne, and 25% thereof to Murray Taylor (A31). Murray Levine testified that Hellerman promised him 10% of the profits of the conspiracy (T927).

Thus, Koss had no "stake in the outcome" of the conspiracy, according to Hellerman, its leader. United States v. Falcone, supra, 109 F. 2d 579, 581 (C.A.2, 1940), affd. 311 U.S. 205 (1940).

The alleged payments by Hellerman to Koss, ranging between 5/16 (30 cents) and 50 cents over the $1.00 per share which the original subscribers paid was no compensation to Koss, because the tabulations on pages 14-15 herein show that the original subscribers were paid at least that much when they sold their shares to buyers, including Koss.

The other alleged payments by Hellerman to Koss, namely, $500 for guaranteeing stockholders' signatures, and 1%, amounting to $29.59 for helping Hellerman cash a check for $2,959.02 at Koss' bank, were alleged payments for services. They were not distributions of profits to a partner in the alleged conspiracy.

Hellerman's aforesaid alleged payments to Koss were only for incidental and subordinate services, equivalent to the services which "runners" performed for operators of numbers games, for which such "runners" were deemed not to be participants in such operators' conspiracy to operate such numbers games, as a matter of law. United States v. Calamaro, supra, 354 U.S.351 (1956).

In Kotteakos v. United States, 328 U.S. 750, 755, (1945), the Court said:

> "The Court of Appeals aptly drew analogy in the comment, 'Thieves who dispose of their loot to a single receiver-- a single 'fence'-- do not by that fact alone become confederates; they may, but it takes more than knowledge that he is a 'fence' to make them such."

POINT II

KOSS WAS PREJUDICED BY EVIDENCE THAT HE PARTICIPATED IN A DIFFERENT CONSPIRACY FROM THE ONE CHARGED IN THE INDICTMENT. SUCH EVIDENCE ENTITLED KOSS TO DISMISSAL OF THE INDICTMENT AGAINST HIM, OR TO A SEVERANCE, OR, AT LEAST, TO A PROTECTIVE CAUTIONARY CHARGE TO THE JURY DIFFERENTIATING THE EVIDENCE AGAINST KOSS FROM THE EVIDENCE AGAINST THE OTHER DEFENDANTS.

I.

The indictment charged Koss with conspiracy to raise the price of shares of Automated; to sell such shares to buyers by means of fraudulent statements to them; and to violate the securities laws and the mail fraud laws in carrying out such conspiracy (A4-5).

There was no evidence that Koss did anything for the purpose of, or which had the effect of raising the price of shares of Automated; or that Koss made any false statement about shares of Automated to any purchaser thereof.

Instead, the evidence was that Koss agreed with Hellerman to avoid defeating Hellerman's efforts to raise the price of such shares, by not selling Koss' shares into the market while Hellerman was trying to raise the price thereof; that for this purpose Koss sold about 10,000 shares to Hellerman, and he agreed to sell his remaining shares gradually in proportion to Hellerman's sales thereof; that he guaranteed signatures on some of Hellerman's stock certificates; that he helped Hellerman cash a check; and that he accepted from Taylor a rubber check for $780 issued by Saxon, and Jackie Mason's check for $5,923.75, in payment for shares bought by Angona and Saxon.

The evidence of Koss' aforesaid actions was evidence of a different conspiracy from the one charged in the indictment. Such evidence prejudiced Koss, and thereby entitled him to dismissal of the indictment. Kotteakos v. United States, 328 U.S. 754, 755, 764 (1964).

II.

Koss was prejudiced in the eyes of the jury by the presentation of evidence of the more serious conspiracy by Hellerman and his associates to commit frauds in their sales of shares of Automated, including issuing stock certificates in names taken from telephone books; forging the endorsements of such telephone book stockholders on stock certificates issued in their names, and forging their endorsements on checks issued in payment for such shares upon sales thereof; and stealing from the company, by its president, Robert Santis, one half of the money raised by the public offering of 65,000 shares, and giving that money to Hellerman as his "fee" for his buying 44,500 of the 65,000 share public offering.

These rapacious acts of fraud greatly prejudiced the jury against Koss, particularly when telephone book name stockholders went on the witness stand, identified the forgeries of their signatures, and testified that they had no knowledge thereof.

Without cautionary instructions by the court, the jury ascribed to Koss guilt for such frauds committed by Hellerman and his associates, deeming Koss a part of the Hellerman conspiracy, because of evidence that Koss sold shares to

Hellerman; guaranteed signatures on stock certificates issued to names taken from telephone books; and did the other things previously listed at page 27 herein.

In United States v. Kelly, 349 F. 2d 720, 756, 757, (C.A.2, 1965), the Court said:

> " *** the proof supporting participation by Shuck in the single, over-all conspiracy alleged in the indictment is tenuous and unsubstantial. ***
>
> * * *
>
> What were the safeguards for the protection of Shuck that the trial judge should have applied and made "impregnable"? One not mentioned by Mr. Justice Rudledge in Blumenthal, but which is peculiarly applicable in this case was the granting of a severance as to Shuck the moment that he was likely to be prejudiced by the accumulation of evidence of wrongdoing by his co-defendants. Another was by making clear in the instructions to the jury that the proofs against Shuck were different from the proofs against Kelly and Hagen, pointing out what the difference was, as we have just done in a few sentences, and making sure that Shuck was given separate and individual attention as distinct from Kelly and Hagen."

In this case, Koss' pre-trial motion for a severance was denied; the jury was not instructed that the evidence against Koss was different from the evidence against the other defendants; such differences were not pointed out to the jury; and the jury was not told to give separate and individual attention to the aforesaid evidence of Koss' actions.

In the Kelly case, supra, the Court further said (349 F. 2d at 757):

> "In a case such as this one it was particularly important that the proofs be marshalled in such fashion as to place clearly before the jury the difference between the evidence against Kelly and Hagen and the evidence against Shuck on the single, over-all conspiracy phase of the case."

In this case, the Trial Court's charge to the jury did not

marshal the evidence in favor of Koss. Instead, it only marshaled the Government's evidence against Koss, and it expressly pointed out how the Government's evidence supported each count of the indictment (T2186-7; T2189; T2193; T2194; T2196).

Zardus, the broker who issued stock certificates to the names taken from telephone books which Murray Taylor gave him, testified that he did not know that such names were fictitious. Zardus said "I still don't know that they are fictitious" (T622). Therefore, Zardus could not possibly have told Koss that the names were fictitious. Hellerman did not say that when he asked Koss to guarantee signatures of stockholders, he told Koss that such signatures were forged, and that the names of such stockholders were taken from telephone books (A63; T184).

The prosecutor deemed Koss' guarantees of such signatures to be the strongest evidence that Koss participated in the conspiracy alleged in the indictment to violate the securities laws, and the mail fraud laws, by raising the price of the shares by means of false statements, and selling them to buyers at inflated prices. The prosecutor began his summation by passing to jurors stock certificates with Koss' signature guarantee thereon; and he called attention to Koss' signature guarantees.

The jury's verdict indicates that it accepted this argument, and ascribed to Koss participation in the conspiracy charged in the indictment, based mainly on his guarantees of forged signatures of stockholders whose names were taken from telephone books.

Even if there were evidence in the record that Koss had

knowledge that the names of such stockholders were fictitious, and that their signatures were forged, that would only be evidence that Koss abetted the negotiation of a forged instrument by guaranteeing such signatures, but the indictment did not charge him with that crime.

Thus, Koss was prejudiced by being tried for the aforesaid conspiracy, when the evidence as to him was mainly that he guaranteed signatures of stockholders on stock certificates, and later it was found that the names of such stockholders were fictitious, and their signatures were forged.

POINT III

THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION OF KOSS ON THE SUBSTANTIVE COUNTS OF STOCK FRAUD, AND MAIL FRAUD, COUNTS 2, 3, 5, 8 AND 11.

I.

While Zardus, the broker, testified on direct examination that he told Koss that (A89):

> " *** Santis had to kick back half of the proceeds of the sale of the shares of stock",

he testified on cross-examination that he did not know of any violations of law (T622-623); and Santis, the president of Automated, contradicted Zardus by testifying that Koss had no knowledge of Hellerman or his participation in the underwriting until around March 10, 1971, when Santis told him that Hellerman was "involved", without testifying in detail how Hellerman was "involved". Santis testified (T1174-1175):

"Mr. Koss did not know of Mr. Hellerman's involvement at the meeting in Mr. Turchin's office in early March. By the time he gave me the check or thereabouts, he knew that Hellerman was involved in the deal. *** We talked about it. *** He said he knows Hellerman, he knows his reputation, he knows he is a stock manipulator. *** I can't be too precise, but it was on or about the time, Your Honor, that he gave me the check for $12,000.

THE COURT: That would be March 10th?
THE WITNESS: Thereabouts.

THE COURT: And this is the first time, to your knowledge, that Koss knew that Hellerman was involved?
THE WITNESS: Yes."

The Court charged the jury that it should (T2186):

" *** consider whether it was material to inform the investing public that Hellerman should have been listed as an underwriter in connection with the offering circular, whether agreement to give Hellerman one half of the proceeds should have been included in the offering circular, and whether there was a failure to maintain a proper escrow account."

We submit there is no evidence in the record that on or before March 2, 1971, when the public offering of 65,000 shares expired, Koss had knowledge that Hellerman was an underwriter thereof; and that the above-quoted charge to the jury went beyond Zardus' above-quoted testimony, and it omitted mention of Santis' above-quoted testimony that until March 10, 1971, Koss had no knowledge that Hellerman was "involved" in the underwriting.

Even if Santis' testimony that on March 10, 1971, he told Koss that Hellerman was "involved" in the underwriting, is expanded to mean that he then told Koss that he was kicking back to Hellerman one half of the proceeds of the underwriting, it was then too late for Koss to do anything about the public offering of 65,000 shares which was completed on March 2, 1971. Therefore, the above-quoted charge to the jury was clearly

erroneous and prejudicial to Koss.

The reference in the charge to the jury to "failure to maintain a proper escrow account" was ambiguous, because it did not state whether it was referring to Zardus' admitted failure to maintain an escrow account - in which case Koss would not be guilty for Zardus' omission, because it was not charged as one of the objects or means of the conspiracy - or whether it was charging Koss with failure to maintain an escrow account, which we will discuss in Point IV, infra.

II.

If Koss' conviction of the conspiracy count is set aside for the reasons discussed in Points I and II herein, then his conviction of the stock fraud and mail fraud substantive counts 2, 3, 5, 8, and 11, will necessarily fall, because those counts do not charge Koss with being the person to whom/or by whom there were mailed the checks in count 2, and the confirmations in counts 3, 5, 8 and 11 (A10; A11; A13).

The mailing of a check to Interstate (Zardus) on March 2, 1971, charged in paragraph 3(a) of count 2 of the indictment, was not sufficient to convict Koss on this count, because there was no evidence that Koss agreed to join the conspiracy until Hellerman testified that around April 10, 1971, in Miami, Florida, Koss agreed to sell to Hellerman 8,800 shares (A49-51).

While Hellerman quoted Murray Levine as saying in February, 1971, that Levine guaranteed that Koss would agree to the Hellerman conspiracy (A24; T131), Levine denied this, and said

"I could not guarantee what Mr. Koss would do" (T894).

III.

For the reasons previously discussed at pages 26-27 herein, conviction of Koss of the substantive offenses charged in counts 2, 3, 5, 8 and 11, although he personally performed no act of participation therein, can be justified only upon a finding that Koss was a partner in the conspiracy, with a partner's stake in its outcome, and not merely a seller of stock to the conspirators, or a guarantor of stockholders' signatures, or that he helped the conspirators cash a check at a bank at which Koss had an account. United States v. Calamaro, supra, 354 U.S.351(1956); Ingram v. United States, supra, 360 U.S. 672 (1959).

POINT IV

THERE WAS INSUFFICIENT EVIDENCE TO CONVICT KOSS OF COUNT 4 OF THE INDICTMENT, WHICH CHARGED HIM WITH NON COMPLIANCE WITH THE REQUIREMENT TO DEPOSIT IN ESCROW MONEY HE RECEIVED FROM SUBSCRIBERS IN THE ALL OR NOTHING PUBLIC OFFERING OF THE SHARES.

On December 30, 1970, Koss opened an escrow account in First Jersey National Bank by depositing therein, in an escrow account, two checks totaling $3,000 (Govt. Exh. 22; 23; T460).

The record contains evidence of the following purchases from Koss by subscribers in the public offering of the shares:

TRADE DATE	SUBSCRIBER	NUMBER SHARES	GOVT. EXH.#
2.4.71	ROSTOKER	100	36; T515
12.16.70	REISCH	300	30A; T689
12.16.70	REISCH	200	30B;T689
12.16.70	GOLS	500	33; T759
3.2.71	MACHER	1,000	63; T1077
12.16.70	DASKALAKIS	200	61A; T1181
	MURPHY	500	57A
	MURPHY	500	57B
12.16.70	DARCY	100	35; T761
12.16.70	JACOBS	200	59; T1269
		3,600	

Excluding Macher's 1,000 shares for which Macher subscribed on March 2, 1971, and for which he did not pay (T1078), the money which Koss received for the remaining 2,600 shares at $1 per share, was covered by Koss' escrow deposit of $3,000 on December 30, 1970. Therefore, there was no evidence that before March 2, 1971, Koss received money from subscribers which he did not deposit in escrow.

Mr. Sorkin said in his summation (T2108-2109):

> "The money that Mr. Koss received by December should have gone into that escrow account. There is a deposit on December 3, 1970, into that escrow account of $3000. But where did that $3000 come from? $125 of it came from the Chase Manhattan Bank, where Koss Securities Corporation had its account.
>
> Where did the remaining $2875 come from? That came from a check drawn against Koss Securities account at Shearson Hammill for the sale of 100 shares of Capital Holding Corp. Who knows if that money ever belonged to the shareholders, the customers, or Mr. Koss? There is no way of telling. ***
>
> *** There is absolutely no evidence anywhere that any customer's funds ever went into the escrow account. All the money was commingled in Mr. Koss' account at the Chase Manhattan Bank in Brooklyn. That is Count No. 4."

We submit that Mr. Sorkin's above-quoted statements in his summation erroneously interpreted and applied S.E.C. Rule 15(c)2-4, and 15 U.S.C. §78-o-(c)(2), which authorized that rule.

The cited statute and rule do not require an underwriter to place in escrow the identical money or check received from a subscriber in an all or nothing offering of securities. Instead, it is sufficient if "promptly" after he receives a check or cash from such a subscriber, the underwriter deposits an equivalent amount of money in an escrow account.

We submit that lawful money has no identity, even though the Government which issues it prints numbers thereon for its own purposes; and that a deposit in escrow of lawful money in the same amount received from a subscriber to an all or nothing offering of securities satisfies the statute and the rule, even though it is not the same money or the check which the underwriter received from the subscriber.

In addition, a subscriber's check for the subscription price is not money, nor is it payment. Only when and if such a check has been paid by the bank on which it was drawn does it become payment. Therefore, such a check is not required to be deposited in an escrow account, but only the proceeds thereof, after it has been paid by the bank on which it was drawn.

POINT V

THE EVIDENCE WAS INSUFFICIENT TO CONVICT KOSS OF COUNT 13 OF THE INDICTMENT, WHICH CHARGED HIM WITH SUBMISSION OF FALSE DOCUMENTS TO THE S.E.C.

To prove the falsity of Koss' answers to a questionnaire, and the falsity of entries in a trading ledger, both of which Koss gave to the S.E.C. on June 15, 1971 (Govt. Exh. 75; 76), the Government presented no evidence that specific entries in those two documents were different from facts shown by other evidence, and, therefore, such entries were false.

Instead, the Government only presented evidence that certain entries in such questionnaire and trading ledger were different from entries in other Koss documents about the same transactions.

In the case of Zardus' records, S.E.C. examiner Walter Walsh testified that he verified both sides of each transaction by examining the other broker's records in each Zardus transaction (T 1487-8); but he did not do this with Koss' records, and he gave no reason for not doing so. (T1501-1502).

Mr. Walsh testified that he saw Koss' canceled checks given in payment for purchases of shares of Automated, and he also saw Koss' customer account cards, and customer signature cards (T1500), but he did not enter on the Government's visual charts the entries on such checks and customer account cards; and he did not examine such checks and customer account cards to determine whether they resolved any differences or ambiguities in two or more entries in the confirmations and order tickets about the same transaction (T1500-1501).

The differences on which the Government relied to prove falsity included: answers in the questionnaire (Govt. exh. 75), and entries in the first trading ledger (Govt. exh. 76), both of which were given to S.E.C.'s Mr. Levitt on June 15, 1971, did not include entries about transactions in shares of Automated shown in order tickets (Govt. exh. 71a-71aa), or confirmations (Govt. exh. 70a-70j), or in a second trading ledger (Govt. exh. 77), given by Koss to the S.E.C.'s Mr. Veneziano in October, 1971, or in confirmations and order tickets which Koss gave to the prosecutor in 1974 (Govt. exh. 2a thru 2ee; Govt. exh. 3a thru 3rr); or such entries differed as to the trade date, or the settlement date of the same transaction; or slightly different prices were reported for the same trade (T 1396-1405).

Mr. Walsh testified that he did not know whether such differences in entries, or absence of an entry in one Koss record which was in another Koss record, indicated falsity of any of such different entries, or absence of entries, in the questionnaire, or in the first trading ledger (Govt. exh. 75;76). (T 1513).

The prosecutor in his summation (T2149-2151), and the Court in its charge to the jury (T2197-2198), did not refer to or identify any one or more entries in the questionnaire (Govt. exh. 75), or in the first trading ledger (Govt. exh. 76), and state that the Government was asking the jury to find false such entry or entries.

We submit that differences in entries, or absence of an entry on one Koss document which is present on another Koss

document, are legally insufficient to establish the falsity of any particular entry in the questionnaire (Govt. exh. 75), or in the first trading ledger (Govt. exh. 76).

In United States v. Weiler, 385 F. 2d 63 (C.A. 3, 1967), it was held that a record of conviction of a person with the same name as the defendant was not sufficient to convict the defendant of falsely writing that he was never convicted of a crime.

See, also: United States v. Lewis, 406 F. 2d 486 (C.A. Illinois, 1969), certiorari denied, 394 U.S. 1013 (1969); Stevens v. United States, 206 F. 2d 64 (C.A. Tenn. 1953).

POINT VI

WITHOUT SUBMITTING THE ISSUE OF ENTRAPMENT TO THE JURY, THE INDICTMENT SHOULD HAVE BEEN DISMISSED FOR ENTRAPMENT, AS A MATTER OF LAW, BECAUSE OF EVIDENCE THAT AT THE TIME WHEN THEY FORMULATED AND CARRIED OUT THE CONSPIRACY, HELLERMAN AND TAYLOR WERE GOVERNMENT INFORMANTS, WHILE THEY, THEMSELVES WERE COMMITTING THE CRIMES CHARGED IN THE INDICTMENT.

At the time when they formulated and took charge of carrying out the conspiracy charged in the indictment, Hellerman and Taylor were both Government informants. Hellerman testified (T227):

"I was talking to Mr. Layne about Murray Taylor, and Mr. Layne said to me, 'It would be very funny if we found out Murray Taylor was a government agent and he was working on this deal with us.'
And as it happened, Murray Taylor was a government informant at the time." (A72: T227).

"I was a government and I told Mr. Morvillo that if I didn't act like I was in this deal that people would think something was wrong, that Michael Hellerman was not doing any deals. Mr. Morvillo told me that I could watch the deal and not to do anything wrong in the deal, not participate, just watch it, and if I did anything wrong I would be prosecuted for it, and it was my greed that made me make money out of the deal." (A85-86; T311-312).

Since Hellerman and Taylor themselves committed the crimes charged in the indictment, instead of only providing an opportunity or an inducement for Koss to commit such crimes, the actions of such Government informants in themselves committing the crimes charged in the indictment requires dismissal of the indictment, as a matter of law, without submitting the issue of entrapment to the jury for decision as a factual issue. Sherman v. United States, 356 U.S. 369 (1957); Sorrells v. United States, 287 U.S. 435 (1932).

United States v. Russell, 411 U.S. 423 (1973), did not decide that the Sherman and Sorrells decisions no longer applied, and no longer barred prosecutions when Government informants themselves committed the crimes charged in an indictment. The opinion in the Russell case limited to narcotic offenses the participation of Government agents or informants in the crimes charged without thereby requiring dismissal of an indictment as a matter of law. The legal effect of commission by Government agents or informants of non drug related crimes upon prosecutions therefor remains to be decided in an appropriate case, such as this case.

In United States v. Archer, F. 2d (C.A.2, 1973), this Court said:

> "We are not sure how we would decide this question if decision were required. Our intuition inclines us to the belief that this case would call for application of Mr. Justice Brandeis' observation in Olmstead. Even though that view has not been incorporated in the entrapment defense, there is certainly a limit to allowing governmental involvement in crime."

While it is not relevant or necessary to our aforesaid argument, there was no evidence that without persuasion or inducement by Hellerman and Taylor, Koss had inclinations to commit the crimes charged in the indictment. Instead, the evidence was that Koss had no such inclinations, as shown by the facts that when Koss was unable to sell more than 15,000 shares, he did not, like Hellerman, sell the other 50,000 shares to himself in names of fictitious stockholders taken from telephone books. Moreover, Koss was never before convicted of a crime, and he had a clean record as a business man, and a family man, and he was active in his church.

POINT VII

KOSS WAS SURPRISED AND PREJUDICED BY INSUFFICIENT PRE-TRIAL DISCLOSURE BY THE GOVERNMENT OF DOCUMENTS AND TRANSACTIONS NOT DISCLOSED IN THE INDICTMENT, OR IN THE BILLS OF PARTICULARS.

The Sixth Amendment gave Koss a constitutional right to be informed of the criminal charges against him. The indictment and the bill of particulars did not inform Koss that he would be charged with selling between 8,800 and 10,000 shares to Hellerman; guaranteeing signatures on stock certificates issued to names taken from telephone books, and accepting $500 therefor, and with knowledge that such names were fictitious

and such signatures were forged; knowledge that Santis agreed to pay and did pay to Hellerman one half of the proceeds of the underwriting; helping Hellerman cash a check for $2,902 at a bank at which Koss had an account, and receiving 1% of the proceeds as compensation therefor.

Koss asked for information about these matters in his motion for a bill of particulars, par.s. 7(d); 11, which was denied after the Government said in its opposing papers that defendants could apply for a pre-trial interview with Hellerman, but when Koss' lawyer applied for such an interview, it was not granted, on the ground that Hellerman's lawyer declined to permit it. Promised copies of crucial exhibits were not given in advance of the trial.

Without particulars about the aforesaid matters, and the other matters about which particulars were requested in Koss' motion, Koss was not prepared to defend himself as to factual issues presented by the Government's evidence on these matters.

POINT VIII

KOSS WAS PREJUDICED BY THE ERRONEOUS EXCLUSION FROM EVIDENCE OF HIS CHECKS, CUSTOMERS' ACCOUNT CARDS, AND CUSTOMERS' SIGNATURE CARDS, WHICH KOSS GAVE TO THE GOVERNMENT PURSUANT TO SUBPOENA DUCES TECUM.

Before the trial, the Court approved a subpoena duces tecum requiring Koss to produce all his records of transactions in shares of Automated, including: trading ledger; confirmations; order tickets; checks issued by Koss; customer account cards or ledger sheets; and customer signature cards.

Pursuant to such subpoena, Koss produced all such records that he still had in his possession in 1974. Poor business conditions forced him to give up his place of business in 1973, and move his operations and his records to smaller space in his home.

Koss' lawyer claimed that he had stipulated with the prosecutor that all the records which Koss produced pursuant to subpoena, shall be admitted in evidence by stipulation (A67;T190) There were received in evidence by stipulation the 1974 trading ledger; the confirmations; and the order tickets; which Koss produced in 1974

However, near the end of the trial, the Court sustained the Government's objection, and excluded from evidence Koss' checks; customer account cards; and customer signature cards.

Thereafter, the prosecutor argued to the jury that Koss' transactions for Angona and Saxon, among others were fictitious; and Koss' lawyer was not able to show the jury the cancelled checks; the customer account cards; and the customer signature cards; which showed that such transactions were not fictitious.

POINT IX

THE ORDER APPOINTING COUNSEL FOR KOSS, AS AN INDIGENT DEFENDANT, SHOULD NOT HAVE BEEN VACATED, EFFECTIVE RETROACTIVELY, LEAVING COUNSEL WITHOUT COMPENSATION FOR HIS WORK.

On June 21, 1974, the Trial Court (METZNER, J.) vacated a prior order, signed March 25, 1974, which appointed counsel for Koss, as an indigent defendant.

In support of his application for appointment of counsel,

Koss stated that he had no property in his name, other than a 1969 car. After the jury found him guilty, Koss told a probation officer that he and his wife each owned one half of the shares in Koss Securities Corp., which had a net worth of $20,000, of which $13,000 was in cash; and that the house in which the Koss family lives had a net worth of $38,000 over the mortgage. However, title to that house has been in the name of Koss' wife, Katherine Koss, for more than ten years.

Koss also submitted to the Court below an Internal Revenue Service notice of deficiency assessment for over $63,000 for income tax deficiency.

To date, Koss has paid only $555 towards the appeal, which may be insufficient to cover printing costs on appeal.

We submit that the Criminal Justice Act, 18 U.S.C. §3006A, does not contemplate retroactive setting aside an order appointing counsel, after such counsel has rendered substantial services pursuant to such appointment; and that, instead, that statute contemplates that any modifications of an order appointing counsel shall be prospective, and not retroactive.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED, AND THE INDICTMENT SHOULD BE DISMISSED, OR A NEW TRIAL SHOULD BE GRANTED.
THE ORDER VACATING THE APPOINTMENT OF COUNSEL SHOULD BE MODIFIED TO PROVIDE THAT IT SHALL BE EFFECTIVE PROSPECTIVELY, AND NOT RETROACTIVELY.

August 6, 1974.

Respectfully submitted,

MORRIS WEISSBERG
Attorney for Appellant.

U.S. COURT OF APPEALS:SECOND CIRCUIT

Index No.

U.S.A.,

Appellee,

against

KOSS, et al,

Defendants-Appellants.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Victor Ortega, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 8th day of August 1974 at U.S. Courthouse, Foley Sq., New York

deponent served the annexed Appellant's Brief upon

Paul J. Curran-U.S. Attorney Southern Dist,-Attny, for Respondent

the in this action by delivering 2 true copies thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Victor Ortega

Print name beneath signature

VICTOR ORTEGA

Sworn to before me, this 8th day of August 19 74

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0118950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975